



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

OBJECTION TO AN  
APPURTENANT RIGHTS CLAIM

Form APRT-OBJ

For Official Use Only:

2012 SEP 21 PM 1:22

**Instructions:** Complete one (1) "Objection to an Appurtenant Rights Claim Form" (Form APRT-OBJ) for each Appurtenant rights claim to which you object.

- Any person or entity with a legal or material interest in the water may file written objections. Persons filing objections must serve copies of the written objection and all related documentation / evidence 1) on the applicant; and 2) on the Commission on Water Resource Management, P.O. Box 621, Honolulu, HI 96809.
- Appurtenant rights claimants will have an opportunity to submit a rebuttal to the written objections.
- For questions, contact the Commission's Stream Protection and Management Branch at (808) 587-0234.

**A. OBJECTOR**

NAME/COMPANY

Wailuku Water Company, LLC

Contact Person

Avery B. Chumbley

Mailing Address

P. O. Box 2790, Wailuku, Hawaii 96793

Phone

808/244-7079

Fax

808/242-7968

E-mail Address

abc@aloha.net

**Explain your legal or material interest in objecting to this Appurtenant rights claim.**

Wailuku Water Company, LLC is the owner and operator of the private distribution system through which the Applicant receives surface water. Determination of Applicant's claim of an appurtenant right to water that is distributed through Wailuku Water Company, LLC's distribution system may impact the operation of the distribution system and will affect the property rights of Wailuku Water Company, LLC.

**B. APPLICANT (As listed in the Public Notice)**

NAME/COMPANY

Wahi Hoomalu Ltd. Partnership

Use Permit Application No.

P.O. Box 351

Mailing Address

Kula, HI 96790

SWUPA# 2351

Identify all Tax Map Keys (TMK) n

TMK: (2)3-3-002-001; (2)3-3-002-026

**C. REASON(S) FOR OBJECTION**

**Select all that apply below. The objector has the burden of proof on all objections.**

☐ The parcel was not used as a residence or for cultivation at the time of the Mahele.

☒ The Appurtenant right to water has been reserved or extinguished.

☒ There are materially false statements or representations in the claimant's application for Appurtenant rights.

**Summarize carefully your objection and how approval of this Application would adversely affect your legal interests (Use separate page if needed):**

The claim must be reviewed in light of the following:

- 1-Whether the claim properly characterized the source of the water for which the claim is asserted;
- 2-Whether the rights claimed are subject to Public Utilities Commission Regulation; and
- 3-Whether the rights have been extinguished.

See the attached sheets which expand on the objections and provide documentary support for the objection(s).

**Supporting documentation / evidence must be provided on separate sheets.**

**D. OBJECTOR SIGNATURE**

☐ By checking this box (for electronic submissions) or signing below (for hardcopy submissions) indicates that the signatory understands and swears that the information provided is accurate and true to the best of their knowledge.

Print Name:

Avery B. Chumbley,  
Authorized Representative

Signature:

Date:

September 18, 2012

FILE ID:

DOC ID:

0111-1-36506  
WUP. 2351-6  
10129

Form APRT-OBJ 08/29/2012

### **Whether the Claim Properly Characterized The Source of Water**

The claim contains an ambiguity or possibly a mischaracterization on the water source for the appurtenant right.

A claimant to an appurtenant right must establish that the surface water was taken directly from the stream, or from an auwai that was connected to a stream, at the time of the original conversion of the property to fee simple title.

Claims based on surface water taken from a privately owned distribution system and not from a stream, especially a distribution system that did not exist at the time of the original fee simple conversion, does not establish an appurtenant right to surface water delivered through a privately owned distribution system.

Accordingly, factual and legal questions exist on whether the subject claim for appurtenant rights derives from a diversion that existed at the time of the original fee simple conversion from a stream or an auwai that was then connected to a stream.

In addition, factual and legal questions exist as to whether applicant is required to hold a stream diversion works permit and/or a stream channel alteration permit and whether there is a right to use a privately owned distribution system if the surface water is being diverted through that privately owned distribution system.

**Rights Claimed May be Subject to Public Utilities Commission Regulation**

The claim asserts a right to use surface water that reaches the claimant's property through a distribution system owned by Wailuku Water Company, LLC

The ability of Wailuku Water Company, LLC to deliver water through that distribution system is the subject of a proceeding pending before the State of Hawaii Public Utilities Commission ("PUC").

Any determination by the Commission on Water Resource Management on claims in which the surface water is delivered through use of the distribution system owned by Wailuku Water Company, LLC must include a condition that the delivery of the surface water is subject to applicable terms, conditions, rules, regulations, decisions, orders, tariffs, and actions of the PUC (collectively "PUC Regulation")

Accordingly, factual and legal questions exist on whether the subject claim for appurtenant rights may be subject to PUC Regulation.

### **Were Appurtenant Water Rights Extinguished**

Appurtenant rights to surface water are created at the time the original conversion to fee simple land. While an appurtenant right to surface water cannot be transferred separately and apart from land to which it attaches, the right can be extinguished.

The appurtenant right to surface water is extinguished if the Grantor of the property transfers the property and either reserves the right to the Grantor or transfers the property without transferring the appurtenant right.

The conveyance document in the chain of title to the subject property contain language to the following effect:

EXCEPTING, RESERVING AND GRANTING, however, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property, including the right to develop and utilize the same; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon.

Accordingly, factual and legal questions exist as to whether an appurtenant right has been extinguished.



R-1212 STATE OF HAWAII  
BUREAU OF CONVEYANCES  
RECORDED  
MAY 05, 2004 02:00 PM  
Doc No(s) 2004-090433



/s/ CARL T. WATANABE  
REGISTRAR OF CONVEYANCES

20 1/1 Z2

CONVEYANCE TAX: \$5.00

LAND COURT

REGULAR SYSTEM

Return By Mail ☒ Pick-Up ☐ To:

CARLSMITH BALL LLP  
One Main Plaza, Suite 400  
2200 Main Street, P.O. Box 1086  
Wailuku, Maui, Hawaii 96793-1086

Attention: Tom C. Leuteneker  
Telephone: (808) 242-4535

TITLE OF DOCUMENT:

QUITCLAIM DEED

PARTIES TO DOCUMENT:

GRANTOR: WAILUKU AGRIBUSINESS CO., INC.  
255 East Waiko Road  
Wailuku, Maui, Hawaii 96793

GRANTEE: WAHI HO'OMALU LIMITED PARTNERSHIP  
P.O. Box 351  
Kula, Maui, Hawaii 96790

TAX MAP KEY(S): (2) 3-3-002-26

(This document consists of 9 pages.)

| LAND COURT SYSTEM                 | REGULAR SYSTEM |
|-----------------------------------|----------------|
| Return by Mail ( ) Pickup ( ) To: |                |

|                         |                              |
|-------------------------|------------------------------|
| Tax Key: (2) 3-3-002-26 | Total No. of Pages: <u>8</u> |
|-------------------------|------------------------------|

QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS:

That WAILUKU AGRIBUSINESS CO., INC., successor in interest to Wailuku Sugar Company, a Hawaii corporation, whose address is 255 East Waiko Road, Wailuku, Maui, Hawaii 96793, hereinafter called the "Grantor," for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration to Grantor paid by WAHI HO'OMALU LIMITED PARTNERSHIP, a Hawaii limited partnership, whose address is P. O. Box 351, Kula, Maui, Hawaii 96790, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does

hereby give, grant, convey, release and forever quitclaim unto the said Grantee, as a tenant in severalty, all of Grantor's right, title and interest in and to the real property described in Exhibit "A" attached hereto and by this reference incorporated herein; subject, however, to all encumbrances noted on said Exhibit "A".

EXCEPTING, RESERVING AND GRANTING, HOWEVER, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property, including the right to develop and utilize the same; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon.

EXCEPTING, RESERVING AND GRANTING, FURTHER, unto Grantor, its successors and assigns forever, as appurtenant to the lands which are located adjacent or in the vicinity of said real property and which are now owned or used or hereafter acquired and used by Grantor, its successors and assigns, in agricultural operation, the unrestricted right to engage in any type of farming operation, including, but not limited to, open burning, percolating, evaporating, fertilizing, milling, generating power, water diversion, plowing, grading, storing, hauling, spraying pesticides, irrigating, crop dusting, and all

other activities incidental to the planting, farming, harvesting and processing of agricultural products and by-products, which operations may from time to time cause noxious emissions such as noise, smoke, dust, light, heat, vapor, odor, chemicals, vibration, and other nuisances to be discharged or emitted over and upon the said real property. Grantor, its successors and assigns, shall not be responsible or liable to Grantee, his heirs, personal representatives and assigns, for the consequences from the creation and discharge of such noxious emissions within the Federal and State environmental and agricultural laws and regulations, and Grantee, its successors and assigns, shall indemnify and hold Grantor, its successors and assigns, harmless from any liability or expense resulting from such claims arising from such nuisance whether made by Grantee or guests or other persons using the said real property.

TO HAVE AND TO HOLD the same, together with all buildings and other improvements, rights, easements, privileges and appurtenances thereon or thereunto belonging or in anywise appertaining or held and enjoyed therewith, unto the said Grantee, forever.

Grantee acknowledges that the said real property is without legal or physical access to any government road. Grantee shall be solely responsible for obtaining any access required by or convenient to Grantee.




The terms "Grantor" and "Grantee", as and when used herein, or any pronouns used in place thereof, shall mean and include the masculine or feminine, or neuter, the singular or plural number, individuals or corporations, and their and each of their respective successors, heirs, personal representatives, and permitted assigns, according to the context hereof. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall for all purposes be joint and several.

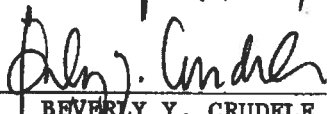
IN WITNESS WHEREOF, the Grantor and Grantee have executed these presents on this 23<sup>rd</sup> day of April, 2004.

APPROVED AS TO FORM:  
MANCINI, WELCH & GEIGER

By Peter A. Horovitz

WAILUKU AGRIBUSINESS CO., INC.

By   
Its Beverly B. Chumbley  
President

By   
Its BEVERLY Y. CRUDELE  
Secretary

Successor in interest to Wailuku  
Sugar Company

Grantor

WAHI HO'OMALU LIMITED PARTNERSHIP

By WAHI HO'OMALU LLC, a Hawaii  
limited liability company  
Its General Partner

By RUSSELL HALE LIMITED  
PARTNERSHIP, a Hawaii  
limited partnership  
Its Member/Manager

By

  
JOHN RUSSELL

Its General Partner

Grantee



STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF MAUI                    )

On this 23 day of April, 2004, before me personally appeared JOHN RUSSELL, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.



Print Name: Jessica R. Cambra  
Notary Public, State of Hawaii.

My commission expires: February 6, 2008

EXHIBIT "A"

All of Grantor's right, title and interest in annd to that parcel of land, situate at Waihee, Island and County of Maui, State of Hawaii, being all of L. C. Aw. 3456:4, containing an area of 0.750 acres, more or less, and identified on the Tax Maps of the Second Taxation Division as Tax Key (2) 3-3-02:26.

SUBJECT, FUTHER HOWEVER, to all encumbrances of record, if any, as of the date of recording of this instrument in the said Bureau of Conveyances.

END OF EXHIBIT "A"

Tax Key: (2) 3-3-02:26